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CASE NO. 90-____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

HARLEY VOLLRATH,

Petitioner,

v.

GEORGIA PACIFIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SIXTH CIRCUIT FAILED TO CORRECTLY APPLY THE *ERIE* DOCTRINE IN DECIDING A STATE LAW CLAIM OF WRONGFUL TERMINATION WHEN MICHIGAN LAW DICTATED REVERSAL OF THE DISTRICT COURT'S GRANT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND THE SIXTH CIRCUIT AFFIRMED THE DISTRICT COURT'S DECISION?

LIST OF ALL PARTIES

All parties are listed in the caption of this case.

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STATUTE:

28 U.S.C. § 1254(1) 1

CASE NO. 90-____

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HARLEY VOLLRATH,

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v.

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CITATION TO OPINIONS BELOW

- *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990)
- *Vollrath* v. *Georgia-Pacific Corp.*, Civil Action No. K-87-226 (W.D. Mich. 1988)

STATEMENT OF JURISDICTIONAL GROUNDS

This Court's jurisdiction is based on 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Sixth Circuit in *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990). The Sixth Circuit rendered its decision on March 30, 1990 (B-1). On April 16, 1990 Plaintiff-Petitioner made motion to extend time in which to file a motion for rehearing *en banc*. The Court granted the

motion on May 4, 1990. On May 31, 1990 the Court issued an order that provided:

> "The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing en banc has been referred to the original hearing panel.
>
> The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied." (A-1).

STATEMENT OF THE CASE

Harley Vollrath, Plaintiff-Petitioner, brought the present case alleging the Georgia-Pacific Corporation, Defendant-Respondent, had wrongfully discharged him. (*Vollrath* v. *Georgia-Pacific Corp.*, Civil Action No. K-87-226, R.1: Petition for Removal with Attachments). Georgia-Pacific removed the case to federal court because of diversity of citizenship and the amount in controversy. Georgia-Pacific asserted a number of affirmative defenses. (*Id.*, R.8: Answer by Defendant with Defenses).

The case was arbitrated and the arbitration award vacated by the District Court. (*Id.*, R.32: Order Vacating Judgment on Arbitration Award). Georgia-Pacific subsequently moved for summary judgment, claiming that Vollrath was an employee at-will and that it had good cause to terminate him. (*Id.*, R.39: Motion by

Defendant to Dismiss and/or for Summary Judgment; R.40: Memorandum by Defendant in Support of its Motion to Dismiss and/or for Summary Judgment). The Court granted Georgia-Pacific's Motion and issued a written opinion. (*Id.*, R.49: Opinion [*see also* C-1, *infra*]; R.50: Judgment in Accordance with Opinion). The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision. (B-1). *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990). Vollrath moved for rehearing *en banc*. Because no judge of the Sixth Circuit expressed an interest in the case, the motion for rehearing was forwarded to the panel that originally heard this case and denied the motion for rehearing. (A-1).

Vollrath has sought review of that adverse decision by this Court.

STATEMENT OF FACTS

In 1981, Harley Vollrath, Plaintiff-Petitioner, began employment with Georgia-Pacific Corporation, Defendant-Respondent. Georgia-Pacific hired Vollrath to fill the position of Area Maintenance Supervisor at a paper mill located in Kalamazoo, Michigan.

In 1983, Georgia-Pacific promoted Vollrath to the position of Plant Maintenance Supervisor at the Kalamazoo mill. During his tenure as Plant Maintenance Supervisor, the mill experienced some problems with a major piece of equipment. (Deposition of Harley Vollrath, at pp. 186, 187). As a result of the problems with that piece of machinery, the maintenance costs for the mill were substantial. The plant manager saw the problem as being Vollrath's performance as Plant Maintenance Supervisor rather than the problems with the machinery. Vollrath's performance reviews, however,

were always consistently high. (Deposition of David Norman, at pp. 39-34).[1]

In 1986, Georgia-Pacific offered Vollrath the position of Field Maintenance Representative in an attempt to remove him from the Plant Maintenance Supervisor position. Vollrath accepted the newly-created position of Field Maintenance Representative.

As a Field Maintenance Representative, Vollrath had the responsibility of handling maintenance problems at more than one mill owned by Georgia-Pacific. Vollrath continued to be based in Kalamazoo and on the Kalamazoo mill's payroll; however, the company charged Vollrath's salary and expenses to all of the mills assigned to Vollrath. (Deposition of David Norman at pp. 72-73). The major emphasis of the position was the Taylorsville, Indiana mill. The problems at the Taylorsville plant seemed unresolveable. Vollrath communicated his opinions concerning the Taylorsville plant's problems to Georgia-Pacific's management. He also indicated that the plant might close if the problems at the Taylorsville plant remained unresolved. (Deposition of Harley Vollrath, at pp. 104, 106).

Although Georgia-Pacific had allocated Vollrath's salary and expenses to several plants, it also contends that it became necessary to eliminate Vollrath's position from the Kalamazoo payroll to eliminate costs. (*See*, Brief in Support of Defendant's Motion to Dismiss

---

[1] "Q. . . . Would it be fair to say that your evaluations, which were performed of Mr. Vollrath on an annual basis, were consistently high?

A. Yes.

Q. Were those based on performance?

A. Yes."

(Deposition of David Norman, at p. 29).

and/or Summary Judgment, at p. 9). The Kalamazoo plant manager, David Norman, testified that the reasons for Vollrath's termination were not because of economic reasons. (Deposition of David Norman, at pp. 61-63).[2] Norman also testified that he made the decision to terminate Vollrath's employment because Vollrath would not go back to the Taylorsville plant; however, Norman's testimony is vague about what Vollrath actually told Norman. (Deposition of David Norman, at pp. 43-46, 64). Furthermore, the termination papers indicated that Vollrath was involuntarily terminated, not that the company eliminated the job. (Deposition of David Norman, at p. 49).

On April 7, 1986, merely three months after being offered the Field Maintenance Representative position, Sam Selders, the Kalamazoo plant's personnel manager, contends that he offered Vollrath two options — termination or transfer to the Taylorsville mill. According to the company, Vollrath refused the transfer to the Taylorsville mill. Vollrath, however, testified that Selders never offered him the job. (Deposition of Harley Vollrath, at pp. 104-106).

During the course of his tenure, David Norman represented to Vollrath, among others, that Vollrath would

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[2] "Q. . . . Let me ask you this: In terms of the elimination of this field representative position, it wasn't eliminated then for economic reasons or any other reason?

A. As long as Harley went to Taylorsville, his salary was charged to them.

* * *

Q. . . . I mean, but in terms of the elimination of the position, was it eliminated because Taylorsville didn't want to pay for Harley any longer?

A. No."

(Deposition of David Norman, at pp. 61-62).

continue to be employed so long as he continued to do his job. (*Id.*, at pp. 31, 109, 120-121, 122, 125).[3]

Vollrath testified during his deposition that Norman stated:

> "'If you are doing your job, you can't be fired. Simple as that.'"

(*Id.*, at p. 31; *See also, id.*, at pp. 36, 109, 113, 120-121, 122, 125-126, 135-136, 137, 145, 204, 241-242, 290-291).[4] Norman made the first such statement to Vollrath in the time period of 1981-1983. (Deposition of Harley Vollrath, at pp. 7-8, 241).[5] In fact, Norman made that

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[3] "Q. Mr. Norman never told you that you would only be discharged only for just cause, did he? He never used words like that did he?

A. All he said, 'If you do your job you can't be fired.'"

(Deposition of Harley Vollrath, at p. 125).

[4] "Q. Do you recall ever telling Harley that as long as he did his job, he wouldn't be fired?

A. I always said that the best way to keep your job is to do it."

(Deposition of David Norman, at p. 54).

[5] "Q. I want to clarify something yesterday. You said that Mr. Norman had made oral statements to you about job security?

A. Yes.

Q. You can't recall verbatim what he said?

A. It was a well-known statement, because he made it to a lot of people, was it you do your job you can't be fired. Exactly what he used to say many times.

Q. When did he say it to you?

A. Oh, gosh. I couldn't give you a date, or anything like that. I really couldn't, you know.

Q. Did he ever say it to you at that time you became the field maintenance or afterwards, or was it prior to that?

(*concluded on page 7*)

statement during a meeting the purpose of which was to discuss Georgia-Pacific's Operating Procedure Manual. (*Id.*, at pp. 30-32).

In addition to the oral assurances made by Norman, Norman also prepared a memorandum indicating Vollrath's employment with Georgia-Pacific to be secure. The memorandum provides:

> "As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Supervisor, he will be given the option to Area Supervisor."

That memorandum served to reinforce both the notion of job security and Norman's authority to make such representations. (*See id.*, at pp. 109-110, 118-119).

Although the 1983 and 1985 Operating Procedure Manuals have indications that the official policy of Georgia-Pacific seemed to be that its employees served at the will of the company; however, Norman, acting as a plant manager for Georgia-Pacific, both failed to enforce that policy and consistently negated it on a number of occasions by indicating that the employees should not refer to it. Vollrath testified that he had no knowledge of Georgia-Pacific's at-will policy. (*See*, Deposition of Harley Vollrath, at pp. 14, 17, 31-32, 36, 209, 292, 295-296); (*See also*, Deposition of David Norman, at p. 56). And, Norman, as previously stated, specifically stated during a meeting of supervisors to discuss the company's Operating Procedure Manual that the supervisors, including Vollrath, would continue

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(*continued from page 6*)

> A. He'd even said prior, before I was even — before I was the superintendent, even. While I was still first line supervisor or area maintenance he used to say it."

(Deposition of Harley Vollrath, at p. 241).

to be employed so long as they did their jobs. (*See*, Deposition of Harley Vollrath, at pp. 30-31).

Much has been made of Vollrath's role in discussions with Georgia-Pacific's attorneys in previous wrongful discharge suits brought while Georgia-Pacific still employed Vollrath. Merely because Vollrath attended meetings held by Georgia-Pacific's attorneys, at which those attorneys explained the defenses they intended to pursue in response to those wrongful discharge suits, fails to establish that those defense theories were, or are, the state of the law given the assurances of job security by Georgia-Pacific to its employees. Vollrath has testified that he did not discuss, with the attorneys, the termination policy. (Deposition of Harley Vollrath, at p. 19). The attorneys' statements constituted nothing more than defense theories, and it was not incumbent on Vollrath to contradict the theories as presented. (*See*, Deposition of Harley Vollrath, at p. 23). To assert that theories presented by attorneys in response to a lawsuit constitutes, without question, company policy is intellectually indefensible.

Georgia-Pacific also made much of contradictory statements and inability of Vollrath to recall certain events. Georgia-Pacific attacked Vollrath's credibility and asked the District Court to accord greater credibility to Georgia-Pacific's witnesses and accept as true what those individuals remember. The District Judge granted Defendant-Respondent's Motion for Summary Judgment. Vollrath contends that Defendant-Respondent's Motion should have been denied because questions of fact remain as to whether Georgia-Pacific employed Vollrath under an employment contract that required good cause for Defendant-Respondent to terminate Vollrath and whether good cause for the termination existed. Vollrath argued to the Sixth Circuit that Mich-

igan law dictated that the District Judge's decision be reversed. The Sixth Circuit instead affirmed the District Judge's decision, holding that Georgia-Pacific's employment contract with Vollrath did not require just cause to discharge Vollrath. The Sixth Circuit also denied Vollrath's Motion for Rehearing.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS FAILING TO APPLY MICHIGAN LAW GOVERNING WRONGFUL TERMINATION CLAIMS.

The sole issue presented by this application is whether the United States Court of Appeals for the Sixth Circuit has failed to apply the *Erie* doctrine in this case. That the Sixth Circuit has failed to apply Michigan law in deciding whether a contract exists in state law claims of wrongful discharge is not new.

In *Pratt* v. *Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), the court failed to apply a decision of the Michigan Court of Appeals, *i.e.*, *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987). The *Pratt* court's rationale was that it was not required to follow the intermediate appellate decision if the state supreme court would have decided that case otherwise.[6] The court, however, could not point to any

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[6] 855 F.2d at 1234 n. 11:

> "The dissent takes us to task for refusing to follow the decision of the Michigan Court of Appeals in *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987). While it is true that '[t]he law of Michigan is controlled by a decision of the Michigan Court of Appeals

(*concluded on page 10*)

other decision of the Michigan Court of Appeals or the Michigan Supreme Court that indicated that *Dalton* was wrongly decided. Rather, the *Pratt* court referred the reader to *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986).

The decision in *Pratt* is indicative of the treatment by the Sixth Circuit of wrongful discharge cases. The court in *Pratt* misapplied the principle that a federal court deciding a state law claim may ignore a decision of the state's intermediate appellate court.

The rule that a federal court need not blindly accept the decision of an intermediate appellate court finds its roots in the cases decided by this Court soon after it decided *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938). The rule is found in *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 467, 61 S. Ct. 336, 85 L. Ed. 284, 287 (1940);[7] *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139, 144

(*continued from page 9*)

> until the Michigan Supreme Court or another panel of the Michigan Court of Appeals rules otherwise,' *Wieczorek* v. *Volkswagenwerk, A.G.*, 731 F.2d 309, 310 (6th Cir. 1984) (citations omitted), it is equally true that we need not blindly follow such precedent where we are '"convinced by other persuasive data that the highest court of the state would decide otherwise."' *Kochins* v. *Linden-Alimak, Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986) (quoting *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1141, 1153 (6th Cir. 1981))."

[7] "We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts . . . must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently . . . In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review."

(1940);[8] *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 177-178, 861 S. Ct. 176, 85 L. Ed. 109 (1940); *Six Counties of California* v. *Joint Highway Dist. No. 267*, 311 U.S. 180, 188, 61 S. Ct. 186, 85 L. Ed. 114 (1940). The Sixth Circuit, however, has misapplied that rule in holding that a just cause employment contract existed in cases in which the Michigan courts would have held that the existence of a just cause employment contract is a jury question.

The Sixth Circuit has continued the trend of ignoring Michigan law in this case. This case presents jury questions as to the existence of a just cause employment contract and the absence of just cause for Vollrath's termination. *See* §§ II A & C, *infra*. In holding that the contract did not require just cause, the Sixth Circuit completely misapplied a Michigan Supreme Court opinion in affirming the District Court's grant of Defendant-Respondent's Motion for Summary Judgment on Vollrath's wrongful discharge claim. *See* § II B, *infra*.

II.

THERE REMAIN QUESTIONS OF MATERIAL FACT AS TO HARLEY VOLLRATH'S WRONGFUL TERMINATION CLAIM.

A. Michigan Law Dictates That A Jury Question Is Presented When The Employee-Plaintiff Produces Evidence That The Employer-Defendant Made Representations, Oral Or Written, That The Employment Relationship Would Be Terminated Without Good Cause.

Georgia-Pacific contends that it had a right to terminate Vollrath with or without good cause to do so.

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[8] "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Georgia-Pacific's Operating Procedure Manual, on the other hand, indicated to Vollrath that the company had a policy assuring job security. Those statements of company policy created a contractual right to be terminated only when the company had good cause for the termination. Because the statements of company policy fail to support Georgia-Pacific's position that Vollrath did not have a contractual right to the effect that Georgia-Pacific could terminate Vollrath only for good cause, a grant of Georgia-Pacific's Motion for Summary Judgment would be erroneous.

The Michigan Supreme Court, in *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), held that an employer's oral or written statements concerning job security may transform an at-will employment relationship into an employment relationship that can be terminated by the employer only when just cause exists. *Toussaint* involves two cases consolidated on appeal: *Toussaint* v. *Blue Cross & Blue Shield of Michigan* and *Ebling* v. *Masco Corp.* Both cases involved representations made by employers that the employees would have jobs so long as they performed their respective jobs satisfactorily. Each employer subsequently discharged those employees without good cause to do so and defended the action by contending that, notwithstanding the assurances to the employee of continued employment, the employee remained an employee-at-will who could be terminated at any time with or without good cause.

The Michigan Supreme Court disagreed with the defendants and held that, when an employer makes representations, either written or oral, an employee will continue to be employed so long as that individual continues doing the assigned work in a satisfactory

manner that the employee can be terminated only for good cause. The court's opinion provides:

> "We hold that:
>
> 1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term the term is 'indefinite';
>
> 2) such a provision may become part of the contract wither by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in the employer's policy statements."
>
> * * *
>
> "4) a jury could also find for Toussaint based on legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies."

Id. at 598, 292 N.W.2d at 885.

The statements need not be expressed in a written contractual statement over which the parties have bargained. In fact, the employees need not see or rely on the policy statements prior to the commencement of employment.[9] All that is necessary is that the employer

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[9] *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 614-615, 292 N.W.2d 880, 892 (1980):

> "We hold that employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee and contains no reference to a specific employee, his reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring."

has implemented a policy regarding employment and termination such that employees have a reasonable expectation that it will be uniformly applied to all employees.[10] The *Toussaint* court also held that the existence of such an employment contract is a question for the jury. *See, id.* at 614, 292 N.W.2d at 892.[11]

Similarly, in *Renny* v. *Port Huron Hospital*, 427 Mich. 415, 398 N.W.2d 327 (1986), the court held that a jury question is presented as to the terms of the employment contract when the plaintiff presents evidence of job security. In so holding, the court stated:

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[10] *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 613, 292 N.W.2d 880, 892 (1980):

> "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, co-operative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need never meet on the subject, *nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices* or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, *and are applied consistently and uniformly to each employee.*" (Emphasis added.)

See also, Schipani v. *Ford Motor Co.*, 102 Mich. App. 606, 612, 302 N.W.2d 307, 311 (1981) ("Here, as in *Toussaint*, it is for the trier of fact to determine whether the contract was not terminable at will because of the defendant employer's oral or written assurances.")

[11] The *Toussaint* court made it clear that an employer can negate any claim by employees that they could be terminated only for just cause. The employer must explicitly state the employees are employeed at the will of the company. *See*, 408 Mich. at 612 n. 24, 292 N.W.2d at 891 n. 24.

> "We find that the trial court properly submitted the question of a just-cause contract to the jury. The existence of a just-cause contract is a question of fact for the jury where the employer establishes written policies and procedures by which to discharge an employee, but does not expressly retain the right to terminate employees at will."

Id. at 417, 398 N.W.2d at 329.[12]

In *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987), the court held that an employment contract that contains contradictory terms on the reasons that must be given for discharge is ambiguous and creates a question of fact to be resolved by the jury.[13] In that case, Herbruck Egg discharged Dalton

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[12] That a contract containing inconsistent or ambiguous terms is to be resolved by a jury is axiomatic. This principle is equally applicable to good cause employment contracts in that the court held in *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984), that "*Toussaint* makes employment contracts which provide that an employee will not be dismissed except for cause enforceable in the same manner as other contracts." *Id.* at 258, 362 N.W.2d at 629.

The Michigan Court of Appeals has also held, on a number of occasions, that the question of the existence of an employment contract to terminate only for good cause is a jury question when evidence of assurances of job security is produced. *See, Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 547, 417 N.W.2d 496, 498 (1987) (progressive disciplinary process is indication of job security); *Ritchie* v. *Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 368-371, 413 N.W.2d 796, 800-801 (1987); *Struble* v. *Lacks Industries Co., Inc.*, 157 Mich. App. 169, 175, 403 N.W.2d 71, 74 (1986); *Hetes* v. *Schefman & Miller Law Office*, 152 Mich. App. 117, 121, 393 N.W.2d 577, 578 (1986) (oral assurances of job security); *Schipani* v. *Ford Motor Co.*, 102 Mich. App. 606, 613, 302 N.W.2d 307, 311 (1981).

[13] A panel of the Sixth Circuit opined in *Pratt* v. *Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), that the Michigan Supreme Court would have decided *Dalton* contrary to the opinion of the Michigan Court of Appeals. Vollrath submits that the *Dalton* decision is consistent with previous decisions of the Michigan Supreme Court.

from his employment with Herbruck Egg without first complying with the stepwise disciplinary proceeding set forth in the employee handbook. Dalton then brought a wrongful termination suit against Herbruck Egg. Herbruck Egg moved for summary disposition contending that the phrase in the handbook, that the handbook provides that the handbook is not a contract, negates Dalton's claim that he could be discharged only pursuant to the disciplinary procedure set forth in the employee handbook. The trial court judge granted the defendant's motion. The Court of Appeals reversed the trial court judge's decision and remanded.

The Court of Appeals held that whether the disciplinary procedure set forth in the handbook constituted a just cause employment contract is a question of fact for the jury. In so holding, the Court held:

> "We believe that the trial judge erred in dismissing plaintiff's action because a jury question existed concerning whether there was an implied employment contract between the parties. The employee handbook, while providing that its provisions were not a contract and that an employee could be terminated at will, also set forth provisions from which plainfiff could have concluded that he would not be reprimanded for his conduct or, at the very most would receive only a verbal warning. The tenor of the entire handbook is that all employees will be fairly and justly treated and treated in accordance with the procedures set forth in the handbook. *Where a policy manual provides both a 'for cause' termination policy and a terminable at will policy, the question of whether an employment contract with a just cause termination policy has*

> *been formed is a question of fact to be resolved by the jury."*

Id. at 547, 417 N.W.2d at 498. (Emphasis added.)[14]

Similarly, in *Langeland* v. *Bronson Methodist Hospital*, 178 Mich. App. 612, 444 N.W.2d 146 (1989), the court reaffirmed the *Dalton* holding. In *Langeland*, the court held that

> "Absent an express retention of the right to terminate employment at will, the existence of a just-cause contract is a question of fact for the jury. *Renny* v *Port Huron Hospital*, 427 Mich 415, 417; 398 NW2d 327 (1986), *reh den* 428 Mich 1206 (1987). Similarly, a jury question exists when an employer's stated termination policies contain expressions of both at-will and just cause employment. *Dalton* v *Herbruck Egg*

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[14] *See also, Schipani* v. *Ford Motor Co.*, 102 Mich. App. 606, 613, 302 N.W.2d 307, 311 (1981):

> "The Court of Appeals in *Kari* v *General Motors Corp*, 79 Mich App 93, 261 NW2d 222 (1977), held that where the defendant employer specifically stated that its separation and pay schedule and conditions, contained in its handbook, were not intended to establish a contractual relationship, '[a]n employee reading this language and that of the general disclaimer at the end of the booklet would have realized that further negotiations, and not merely the acceptance of an employment with General Motors, are necessary to create a contract for severance pay.' However, *the Supreme Court reversed Kari* v *General Motors, supra,* by order in lieu of leave to appeal, 402 Mich 926 (1978), *remanding the action to the trial court to consider all of plaintiff's claims including claims raised by plaintiff's interpretation of the handbook and possible oral promises to award the separation allowance. This remand may indicate the Supreme Court's belief that under appropriate circumstances, oral promises may negate the effect of disclaimers which are intended to absolve employers from liability for policies presented in handbooks or other employer literature."*

(Emphasis added.)

> *Sales Corp*, 164 Mich App 543, 547; 417 NW2d 496 (1987)."

178 Mich. App. at 615, 444 N.W.2d at 148.

In *Langeland*, the employee handbook contained expressions indicating both a just-cause employment relationship and an at-will employment relationship. The manual defined "discharge" as "termination at the will of the employer"; however, the handbook qualified the definition by requiring "'some fault on the part of the worker.'" *Id.* at 616, 444 N.W.2d at 148. The court also focused on the portion of the handbook that provided for discharge:

> "Defendant's policies enumerate twenty offenses which may lead to employee discipline and outline the normal disciplinary procedures which precede termination. Although the policies state that the execution of such procedures is a matter of 'management prerogative,' other language suggests that immediate dismissal is an extraordinary penalty to be used only for the most serious infractions, such as theft or falsification of company records."

Id. at 616. The plaintiff, therefore, had raised a jury question concerning the terms of the employment contract. [15]

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[15] *Id.* at 616-617, 444 N.W.2d at 149:

> "We also agree with plaintiff's argument that his deposition testimony was sufficient to create a jury question on the issue of his subjective expectation that his employment could be terminated only for just cause. We are unpersuaded by defendant's argument that certain portions of plaintiff's testimony amount to an admission that his employment contract was terminable at will. While plaintiff conceded that it was for defendant's administrators to determine whether certain conduct warranted dismissal,

(*concluded on page 19*)

Whether a jury question exists, therefore, is dependent on whether evidence of assurance of job security is produced. Here, Vollrath testified that his superior, Norman, told Vollrath, among others, that if Georgia-Pacific employees did their jobs they could not be terminated by Georgia-Pacific.[16]

B. Georgia-Pacific's Unilateral Promulgation Of An At-Will Policy In The 1983 And 1985 Operating Procedures Manuals Fails To Alter The Terms Of Vollrath's Employment Contract.

Georgia-Pacific claimed, and the Sixth Circuit held, that the promulgation of at-will policies altered the employment relationship between Georgia-Pacific and Vollrath. Such unilateral promulgation of personnel policies, however, cannot, in and of itself, override an express oral contract that the employee can be termi-

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(*continued from page 18*)

> plaintiff did not say he believed that defendant could terminate his employment in violation of defendant's stated policies or bypass the disciplinary procedure set forth therein. Whether plaintiff's beliefs were reasonable and whether defendant did indeed violate its disciplinary policies were questions of fact to be decided by the jury. *Struble* v *Lacks Industries, Inc*, 157 Mich App 169, 175; 403 NE2d 71 (1986)."

[16] Compare the oral assurance made by Norman to Vollrath with the oral assurances made in the following cases that held a jury question exists as to the terms of the employment contract: *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472, 475-477, 444 N.W.2d 114, 115 (1989) (the plaintiff would have a lifetime job as long as he did not steal); *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 597 n. 5, 292 N.W.2d 880, 884 n. 5 (1980) (oral statement that the plaintiff would be terminated only for cause); *Ritchie* v. *Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 364, 413 N.W.2d 796, 799 (1987) (statement, among others, that the plaintiff would have a job with the defendant as long as the employer continued to have a work location where the plaintiff was employed); *Hetes* v. *Schefman & Miller Law Office*, 152 Mich. App. 117, 119, 393 N.W.2d 577 (1986) (the plaintiff was told that she would have a job as long as she did a good job).

nated only for good cause. In this case, Georgia-Pacific employed Vollrath pursuant to an express oral contract, the express terms of which could not be unilaterally modified by Georgia-Pacific.

In *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472, 444 N.W.2d 114 (1989), the court held that the mere issuance of an employee manual containing an at-will disclaimer is ineffective in modifying an express employment contract providing for termination only for good cause. The *Bullock* court emphasized that an employment contract may be established in any number of ways.[17] The question then to be resolved was whether the employer could unilaterally modify an express employment contract that required good cause for termination. The court held that such a unilateral modification is merely an offer of modification subject to acceptance by the affected employee.[18]

In *Bullock*, the defendant argued that the plaintiff's continued employment constituted acceptance of the

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[17] *Id.* at 480, 444 N.W.2d at 117:

> "While the policy manual legitimate expectations analysis of *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), may have in practice obscured that portion of the opinion dealing with a contract arising from an express agreement, oral or written, it is clear that the *Toussaint* majority held both that a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable and that the contract may be established in alternative ways."

[18] *Id.* at 483, 444 N.W.2d at 119:

> "The employment manuals submitted by the defendant, to the extent that they do not constitute unilateral modification of the policy basis of plaintiff's claim, must be seen on this record as an *offer to modify the discharge-for-cause provision of Bullock's alleged express contract and do not entitle the defendant to summary disposition.*"

(Emphasis added.)

at-will policy set forth in the employee manual by the defendant. Although the *Bullock* majority did not specifically address that argument, Justice Levin, concurring, found the argument to be unpersuasive:

> "AAA maintains that unilateral contract principles bind Bullock to AAA's revisions regardless of the original terms of the employment contract. Under this analysis, when an employer unilaterally changes its policies, an employee's continued performance constitutes consideration for, and acceptance of, the new terms of employment. An employee is then bound by the new terms and can no longer rely on the employer's prior policies.
>
> In *In re Certified Questions*, this Court considered unilateral contract analysis in a case concerning an employer's unilateral change from a discharge-for-cause policy to a termination-at-will policy, and said that it found 'unilateral contract theory . . . inadequate as a basis for [its] answer . . . .'"
>
> Even if the revision in the manual in *In re Certified Question* from discharge for cause to termination at will was an offer by Storer Broadcasting Company of a change in the employment contract, there was no reason to suppose that the plaintiff, Kenneth Bankey, accepted such an offer. See *Thompson* v *Kings Entertainment*, 653 F Supp 871 (ED Va, 1987), where the court said that the employer failed to show that the employee had accepted the revision in policy from dismissal for cause to termination at will."

Id. at 505-506, 444 N.W.2d at 129.[19]

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[19] Justice Levin refers to a case decided at the same time the court decided *Bullock — In re Certified Question (Bankey* v. *Storer Broadcasting Co.)*, 432 Mich. 438, 443 N.W.2d 112 (1989). There the

(*concluded on page 22*)

In this case, Norman made a number of oral statements to Vollrath that Vollrath could be discharged only for good cause. Norman made those statements to Vollrath as early as 1981. Georgia-Pacific, however, insists that the disclaimers issued in 1983 and 1985 completely negate Norman's statements.[20]

The 1983 OPM provided that Georgia-Pacific's employees were employed at the will of the company and that the contract could be modified only in writing:

(*continued from page 21*)

court held that an employer may modify the employment relationship from a just-cause one to an at-will one by the unilateral issuance of an employee handbook that contains an at-will disclaimer if the just-cause relationship was based solely on the previous employee handbook.

[20] The panel of the Sixth Circuit that decided this case has misconstrued the *Bullock* holding and rationale. The panel stated, in pertinent part:

> "In his reply brief, appellant argues that the present case is similar to *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472 (1989). In *Bullock*, appellant argues, the court indicated that the issuance of an employee manual containing an at will disclaimer does not effectively modify an express employment contract which preceded the manual. The plaintiff in *Bullock*, an insurance salesman, alleged that when he was hired he was promised he could continue to receive 7% commission on his 'book of business,' the accumulated memberships and policies he built up over the years. After plaintiff had worked under this agreement for a number of years, the employer revised that program so that instead of a percentage of the commissions on those memberships and policies, the salesman received only a certain amount for each, an amount less than the percentage. Plaintiff failed to generate the required minimum commissions under the revised program and was discharged. The court held that there was an express promise to pay 7% commissions on the agent's 'book of business.' Plaintiff here did not rely on an express contract. Rather, he was relying upon an employer's policy statements. Those policy statements could be and were modified by the written policy statement."

899 F.2d at 536.

> "No employee or representative of Georgia-Pacific, other than the Chief Executive Officer or the Corporate Director–Employee Relations and Administrative Services, has any authority to enter into any agreement extending the employment of any employee for only specific periods of time, or to make any agreement contrary to the foregoing."

The 1985 OPM provides:

> "It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President–Human Resources."

Georgia-Pacific, however, had already become bound to a just cause employment contract because of oral statements made to Vollrath.

In this case, the applicable employee manual, the 1985 OPM, stated that Georgia-Pacific's employees were employees at the will of the company. The plant manager of the Kalamazoo plant, however, stated to Vollrath that he had job security at Georgia-Pacific. The oral representations of the plant manager constitute an express contract between Vollrath and Georgia-Pacific that may be modified by Georgia-Pacific only with Vollrath's assent. Unilateral modification of that contract by the mere issuance of employee handbooks is ineffective in modifying the employment contract.

It is noteworthy that the oral assurances to Vollrath, through David Norman, emphasized long-term security

afforded to Georgia-Pacific's employees. No mention, however, was made of any disclaimer contained within the Operating Procedure Manual. Vollrath then relied on the oral assurances of job security.

C. There Remains A Question Of Material Fact As To Whether Georgia-Pacific Had Good Cause To Discharge Harley Vollrath, Which Is A Question Of Fact To Be Determined By The Jury.

The question of whether an employer had good cause to discharge one of its former employees is clearly a fact-specific one. An array of factors are involved in the decision to discharge an employee, including work performance, the employee's attitude, and the facts and circumstances surrounding the discharge. Whether the employer had good cause to discharge the former employee is a question that is not conducive to disposition in a Summary Judgment proceeding.

In *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), the court held that the question of whether good cause existed to discharge the former employee is a question for the jury. There, the court expressly discussed the role of the jury in determining whether good cause existed for the discharge.

> "We all agree that where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work . . .
>
> The role of the jury will differ with each case. Where the employer claims that the employee

was charged for specific misconduct — intoxication, dishonesty, insubordination — and the employee claims that he did not commit the misconduct alleged, the question is one of fact for the jury: did the employee do what the employer said he did?"

* * *

"Where an employee is discharged for stated reasons which he contends are not 'good cause' for discharge, there is the danger that it will substitute its judgment for the employer's. If the jurors would not have fired the employee for doing what he admittedly did, or they find he did, the employer may be held liable in damages although the employee was discharged in good faith and the employer's decision was not unreasonable.

While the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include a right to be discharged only with the concurrence of the communal judgment of the jury. Nevertheless, we have considered and rejected the alternative of instructing the jury that it may not find a breach if it finds the employer's decision to discharge the employee was not unreasonable under the circumstances."

* * *

"Where the employee has secured a promise not to be discharged except for cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable. An instruction which permits the jury to review

only for reasonableness inadequately enforces that promise.

In addition to deciding the questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reason for discharge amounts to good cause: is it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job?"

Id. at 621-623, 292 N.W.2d at 896.

A panel of the Sixth Circuit reaffirmed, in *Diggs* v. *Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914 (6th Cir. 1988), that the question of good cause is one for the jury:

"Pepsi-Cola argues that the district court was bound as a matter of law to uphold its determination that customer complaints lodged against Diggs provided just cause for his discharge as a matter of law. It contends that any other holding, in effect, relegates essential employment decisions to the courts, not to the employer charged with such responsibilities. It is indeed true that the trial court accepted the fact that the complaints actually occurred and that they were serious in nature. Thus, Pepsi-Cola argues that anything other than a finding of good cause was an impermissible interference with its business judgment.

Pepsi-Cola states that 'the Michigan Supreme Court has provided little guidance on the meaning of the just cause . . . .' the answer to the claim lies in the language of *Toussaint* itself. The court states, '[A] promise to terminate

> employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge.' *Toussaint*, 408 Mich. at 621, 292 N.W.2d at 895. The court went on to say that 'the jury should . . . decide whether the reason for discharge amounts to good cause.' *Id.* at 623, 292 N.W.2d at 896. The Michigan Supreme Court recently reaffirmed this position in *Renny* v. *Port Huron Hospital*, 427 Mich. 415, 429, 398 N.W.2d 327, 335 (1986):
>
> > 'The jury decides as a matter of fact whether the employee was discharged for cause. While the jury may not substitute its opinion for that of the employer's, it may determine whether the employee committed the specific misconduct for which he was fired, whether the reason for discharge amounts to good cause, or whether the employer was selectively applying the rules. It is not enough that an employer acted in good faith or was not unreasonable.'"

Id. at 920-921.

That the existence of good cause for the discharge is a jury question has ample other support. *See, Wiskotoni* v. *Michigan National Bank – West*, 716 F.2d 378, 386 (6th Cir. 1983); *Ritchie* v. *Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 368-371, 413 N.W.2d 796 (1987); *Struble* v. *Lacks Industries Co., Inc.*, 157 Mich. App. 169, 175, 403 N.W.2d 71, 74 (1986); *Hetes* v. *Schefman & Miller Law Office*, 152 Mich. App. 117, 121, 393 N.W.2d 577, 578 (1986); *Rasch* v. *City of East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985); *Schwartz* v. *Michigan Sugar Co.*, 106 Mich. App. 471, 477-478, 308 N.W.2d 459, 462 (1981); *Schipani* v. *Ford*

Motor Co., 102 Mich. App. 606, 612, 302 N.W.2d 307, 311 (1981).

There is contradictory testimony as to whether Georgia-Pacific had good cause for Vollrath's termination. Vollrath's performance reviews were consistently high. There also exist questions about whether there was, in fact, a reduction in the work force as claimed by Georgia-Pacific. Because the issue is unclear, it is impossible to determine as a matter of law whether Defendant-Respondent had good cause to terminate Vollrath.

Vollrath argued that the alleged offer of a position at the Taylorsville plant casts doubt on Georgia-Pacific's contention that it terminated Vollrath as a result of an economic reduction in the workforce. The Sixth Circuit never reached this issue. Furthermore, the issue is currently pending before the Michigan Supreme Court. *See, McCart* v. *J. Walter Thompson, U.S.A., Inc.*, 181 Mich. App. 611, 450 N.W.2d 10 (1989), *leave granted*, 434 Mich. 909 (1990).

CONCLUSION

Plaintiff-Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit and reverse that Court's decision.

Respectfully submitted,

SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C.

By: /s/ LIONEL J. POSTIC (P37120)
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Dated: August 29, 1990

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed May 31, 1990)

(HARLEY VOLLRATH, Plaintiff-Appellant, v. GEORGIA-PACIFIC CORPORATION, A FOREIGN CORPORATION, Defendant-Appellee — No. 89-1207)

BEFORE: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX B

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed March 30, 1990)

(HARLEY VOLLRATH, Plaintiff-Appellant, v. GEORGIA-PACIFIC CORPORATION, Defendant-Appellee — No. 89-1207; ON APPEAL from the United States District Court for the Western District of Michigan)

Before: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Vollrath, a former high-level management employee for appellee Georgia-Pacific Corporation, apepals the summary judgment of dismissal of his complaint alleging wrongful discharge in violation of an implied employment contract terminable only for cause. Vollrath asserts that there remain questions of material fact regarding his claim of wrongful termination. We find that there is no genuine issue as to any material fact and that appellee is entitled to a judgment as a matter of law. Accordingly, we AFFIRM the District Court's order granting Georgia-Pacific's Motion for Summary Judgment.

Georgia-Pacific operates a small paper mill in Kalamazoo, Michigan. It hired appellant to work as a utility person on or around April 13, 1967. Appellant later became an electrician-millwright. In 1983, appellee promoted appellant to the position of Area Maintenance Supervisor of the Kalamazoo mill. In

January 1986, appellant accepted the newly created position of Field Maintenance Representative. On April 7, 1986, he was discharged from that position.

Appellant alleges that appellee discharged him without just cause and without providing him an opportunity to return to the Area Maintenance Suipervisor position, thereby breaching a contractual obligation. Appellant claims that he had a legitimate expectation of dismissal only for cause based upon representations made by the Kalamazoo plant manager. First, appellant claims that the plant manager represented to him in informal conversations that he would continue in employment as long as he continued to do his job. Second, appellant provides evidence of a memorandum given to him by the plant manager around March of 1984†, which stated:

> As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Superintendent, he will be given the option to return to Area Supervisor.

Appellee maintains that Vollrath was an employee terminable at will. Further, appellee argues that Vollrath was discharged because his position was eliminated for economic reasons as part of a gradual reduction in the work force at the Kalamazoo facility.

Appellee bases its assertion that appellant was an employee at will on the fact that in 1983 appellee had prepared and distributed an Operating Policy Manual (OPM) to certain salaried supervisory employees, including appellant.

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† [*Printer's Note*: Pursuant to instructional letter of 4/3/90 from L. Green, Court clerk, the year as printed above has been changed from the original "1904," a typographical error.]

In 1985, appellee updated its OPM, further clarifying its at will policy. The 1983 OPM provides, in relevant part:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. No employee or representative of Georgia-Pacific, other than the Chief Executive Officer or the Corporate Director – Employee Relations and Administrative Services, has any authority to enter into any agreement extending the employment of any employee for any specified period of time, or to make any agreement contrary to the foregoing.

The 1985 OPM provides in relevant part:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President – Human Resources.

Later, it provides:

> 5. **Other Involuntary Discharges.** There may be grounds for discharge other than those discussed above. This discussion is not meant to be inclusive or to limit in any way management's freedom to discharge an employee at any time for any reason not prohibited by law.

In reviewing the District Court's grant of summary judgment, we are required to review "de novo" the District Court's findings. *Burkart* v. *Post-Browning, Inc.*, 859 F.2d 1245, 1249 (6th Cir. 1988). Summary judgment is appropriate where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A material issue of fact exists where a reasonable jury, viewing the evidence in the light most favorable to the non-moving party, could return a verdict for that party. *Boddy* v. *Dean*, 821 F.2d 346, 349 (6th Cir. 1987).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record demonstrating the absence of a material issue of fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center* v. *City Hosp. Ass'n*, 800 F.2d 568, 572 (6th Cir. 1986). The non-moving party must then go beyond the pleadings and come forward with specific facts showing that there is a genuine issue of material fact. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his or her claim, summary judgment is appropriate. Fed. R. Civ. P. 56(e).

Under Michigan law, "[e]mployers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily

terminate an employment contract at any time for any, or no, reason." *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 258-59 (1984) (footnote omitted). However, where an employer adopts a policy of discharge only for cause, through either formal or informal actions, an employee has a right to rely on that policy and may not be discharged in violation of such a policy. *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 598 (1980). Therefore, in order to withstand defendant's motion for summary judgment, appellant must demonstrate that a genuine issue of material fact exists as to whether Georgia-Pacific, through formal or informal actions, adopted a policy of discharge only for cause.

Both the 1983 and the 1985 OPMs explicitly set forth Georgia-Pacific's at will policy with respect to terminations. Neither of the bases upon which appellant claims his expectation of dismissal only for cause rested persuade us that this policy was modified once it was established.

Vollrath's assertion that the plant manager told him and others on numerous occasions that he would not lose his job if he did his job established at most a subjective expectation of dismissal only for cause. As the District Court noted, comments regarding continued employment such as chances are "very good" do not affect the company's termination policy. *See Pratt* v. *Brown Mach. Co.*, 855 F.2d 1225, 1234 (6th Cir. 1988). Further, a "'subjective expectation does not create an enforceable contract right.'" *Dell* v. *Montgomery Ward and Co.*, 811 F.2d 970, 974 (6th Cir. 1987) (quoting *Sepanske* v. *Bendix Corp.*, 147 Mich. App. 819, 827 (1985)).

The memorandum written from the plant manager to Vollrath did not create an implied contract, for it was

written at the time the 1983 OPM was in effect, and the written 1983 at will policy specifically indicated that it could not be modified except by the Chief Executive Officer of the corporation. Further, Vollrath admitted in his deposition that he was aware that the company could unilaterally change its policies and that he would be bound by them. In *Toussaint*, 408 Mich. at 619, the court states that "[e]mployers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force."

Appellant attempts to rely upon *Dalton* v. *Herbruck Egg and Sales Corp.*, 164 Mich. App. 543 (1987), wherein the Michigan Court of Appeals held, "Where a policy manual provides both a 'for cause' termination policy and a terminable at will policy, the question of whether an employment contract with a just cause termination policy has been formed is a question of fact to be resolved by the jury." *Id.* at 547. Even if two termination policies were provided for by Georgia-Pacific in the present case, this case is not analogous to *Dalton*, for the Georgia-Pacific policy manuals clearly provide only for an at will termination policy. Appellant argues that the for cause termination policy arose through a separate statement, not through the manuals. In appellant's initial statement of facts, he claims that the oral statement on which he relied occurred after the issuance of the 1983 and 1985 OPMs. Furthermore, as appellant admits, this Court has held that "we need not blindly follow such precedent [*Dalton*] where we are 'convinced by other persuasive data that the highest court of the state would decide otherwise,'" and that "*Dalton* is inconsistent with the teachings of *Toussaint* and its progeny . . . ." *Pratt* v. *Brown Mach. Co.*, 855 F.2d at 1234 n. 11 (citing *Kochins* v. *Linden-*

Alimak, Inc., 799 F.2d 1128, 1140 (6th Cir. 1986) (quoting *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981)).

In his reply brief, appellant argues that the present case is similar to *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472 (1989). In *Bullock*, appellant argues, the court indicated that the issuance of an employee manual containing an at will disclaimer does not effectively modify an express employment contract which preceded the manual. The plaintiff in *Bullock*, an insurance salesman, alleged that when he was hired he was promised he could continue to receive 7% commission on his "book of business," the accumulated memberships and policies he built up over the years. After plaintiff had worked under this agreement for a number of years, the employer revised that program so that instead of a percentage of the commissions on those memberships and policies, the salesman received only a certain amount for each, an amount less than the percentage. Plaintiff failed to generate the required minimum commissions under the revised program and was discharged. The court held that there was an issue of fact as to whether there had been a breach of the express promise to pay 7% commissions on an agent's "book of business." Plaintiff here did not rely on an express contract. Rather, he was relying upon an employer's policy statements. Those policy statements could be and were modified by the written policy statement.

Appellant also asserts in his reply brief that his deposition testimony indicated that he does not recall reading the at will language of the 1985 OPM. Later in his deposition testimony, however, Vollrath admitted that he had read it. Although at an earlier deposition he indicated that he did not recall reading the termination section of the OPM, the latter testimony was taken

after his wife found his copy of the manual, and this event seemed to jog appellant's memory. Moreover, appellant "may not create a dispute of fact concerning an issue about which he has no recollection." *Pratt*, 855 F.2d at 1233.

We conclude that appellant has not met his burden of coming forward with specific facts showing that there is a genuine issue of material fact. Accordingly, we AFFIRM the District Court's order granting Georgia-Pacific's Motion for Summary Judgment.

APPENDIX C

JUDGMENT AND OPINION

(United States District Court —
Western District of Michigan — Southern Division)

(Dated December 5, 1988)

(HARLEY VOLLRATH, Plaintiff, v. GEORGIA-PACIFIC CORPORATION, Defendant — File No. K87-226 CA; Hon. Benjamin F. Gibson)

JUDGMENT

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 5th day of December, 1988.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE.

In accordance with the Opinion dated December 5, 1988, IT IS HEREBY ORDERED that the defendant Georgia-Pacific Corporation's motion for summary judgment is GRANTED and the instant lawsuit is dismissed, with prejudice.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

(*Certification Omitted*)

OPINION

Plaintiff Harley Vollrath ("Vollrath") filed this action against defendant Georgia-Pacific Corporation ("Georgia-

Pacific") alleging breach of an implied contract of employment which required just cause for dismissal. Georgia-Pacific denies the existence of a just cause contract of employment, but alternatively asserts that since plaintiff's job was eliminated as a part of a reduction in workforce, plaintiff cannot assert a breach of employment contract claim for wrongful discharge. The basis of this Court's jurisdiction is diversity of citizenship pursuant to Title 28 United States Code Section 1332. Presently pending before the Court is defendant's motion for summary judgment. The Court has reviewed defendant's motion, plaintiff's response, defendant's reply brief, the arguments presented, and the evidence in support thereof. For the reasons stated below, Georgia-Pacific's motion for summary judgment is granted and the instant lawsuit is dismissed.

FACTS

According to Vollrath's complaint, Georgia-Pacific hired him to work as a utility person in or around April 13, 1967.[1] Vollrath later became an electrician-millwright. In 1981, Vollrath was promoted to the position of Area Maintenance Supervisor at a paper mill in Kalamazoo, Michigan. Vollrath was again promoted in 1983, this time to the position of Plant Maintenance Supervisor at the Kalamazoo mill. Ultimately, Vollrath was offered and accepted the newly created position of Field Maintenance Representative in January 1986. Vollrath was discharged from this position on April 7, 1986.[2]

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[1] Georgia-Pacific states in its answer that Vollrath was initially hired on October 20, 1967. However, the exact date is irrelevant for the purposes of this motion.

[2] Georgia-Pacific states in its answer that Vollrath's employment with Georgia-Pacific ended effective May 2, 1986. Again, the exact date is irrelevant for purposes of this motion.

Vollrath alleges that Georgia-Pacific breached its contractual obligation by discharging him without just cause and without providing him an opportunity to return to the Area Maintenance Supervisor position. Vollrath claims that he had a legitimate expectation of dismissal only for cause based on representations made by the Kalamazoo Plant Manager. First, Vollrath claims that the Plant Manager represented to him in informal conversations that he would continue in employment as long as he continued to do his job. Second, Vollrath provides evidence of a memorandum given to him by the Plant Manager around March of 1984 that stated:

> As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Superintendent, he will be given the option to return to Area Supervisor.

Georgia-Pacific maintains that Vollrath was an employee terminable at will. Further, Georgia-Pacific argues that Vollrath was discharged because his position was "eliminated for economic reasons as part of an ongoing general directive to reduce the number of salaried employees on the Kalamazoo facility's payroll."

Georgia-Pacific prepared and distributed an Operating Policy Manual ("OPM") to certain salaried supervisory employees, including Georgia-Pacific. The 1983 OPM set forth a specific at-will disclaimer.[3] Further, it pro-

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[3] The 1983 OPM provides in the first paragraph of the section entitled "Termination of Employment — Salaried Employees":

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. No employee or representative of Georgia-Pacific, other than the Chief Executive Officer or the Corporate Director–Employee Relations and Administrative Services, has any authority to enter into any agreement extending the employment of any employee for any specified period of time, or to make any agreement contrary to the foregoing.

vided that "there will be no exceptions to this policy without the prior written approval of the Chief Executive Officer of the Company." Vollrath conceded that he might have had a 1983 OPM and a copy was found in his office with his handwritten name on it. In 1985 Georgia-Pacific updated its OPM, further clarifying its at-will policy.[4] Vollrath's deposition testimony admits that he read the 1985 OPM section on terminations and that it applied to him.

In 1983 and 1984, Georgia-Pacific's Kalamazoo mill was involved in two wrongful discharge lawsuits filed by former salaried employees. At that time, the attorney for Georgia-Pacific met with Vollrath and another supervisory employee. During the course of this meeting, the Georgia-Pacific's at-will policy was discussed. In addition, in preparing for the litigation Georgia-Pacific's attorney conducted depositions which Vollrath attended. During the course of these depositions questions were asked pertaining to Georgia-Pacific's at-will policy. Finally, during another case preparation meeting, Georgia-Pacific's Kalamazoo Plant Manager went over the at-will policy with the super-

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[4] The 1985 OPM provides in the first paragraph of the section entitled "Termination of Employment — Salaried Employees":

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President–Human Resources.

Further on in the same section, it provides:

> 5. Other Involuntary Terminations. There may be grounds for discharge other than those discussed above. This discussion is not meant to be inclusive or to limit in any way management's freedom to discharge an employee at any time for any reason not prohibited by law.

visory employees and advised Vollrath to go over the policy with his employees to avoid future problems.

In response to the two wrongful discharge lawsuits, Georgia-Pacific's Kalamazoo Assistant Personnel Manager held meetings with the salaried employees at the request of the Plant Manager in order to inform the employees about the at-will policy. At these meetings, the Assistant Personnel Manager specifically told the employees to read the at-will policy and asked if there were any questions. Subsequent to these meetings, certain top level managers, including Vollrath, were again asked to review the at-will policy with their subordinates. Plaintiff's deposition testimony admits that he did meet with his subordinate supervisors to advise them to read the OPM.

STANDARD FOR REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc.* v. *Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy* v. *Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323

(1986); *Potters Medical Center* v. *City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

ANALYSIS

Under Michigan law, contracts of employment for an indefinite period are generally terminable at will. As the Supreme Court of Michigan has stated, "Employers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily terminate an employment contract at any time for any, or no, reason." *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 258-59 (1984) (footnote omitted). However, where an employer adopts a policy of discharge for cause only, through either formal or informal actions, an employee has a right to rely on that policy and may not be discharged in violation thereof. *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 598 (1980). In order to withstand defendant's motion for summary judgment, there must be evidence presented that Georgia-Pacific, through formal or informal actions, adopted a policy of discharge only for cause.

In this case, it is undisputed that Vollrath was not hired pursuant to a written contract. The only written employment policies before the Court neither state nor imply that Georgia-Pacific's employees could be termi-

nated only for cause. On the contrary, Georgia-Pacific's 1983 OPM and 1985 OPM specifically indicate that employees could be terminated "with or without cause, at any time."

Notwithstanding the explicit at-will policy in the OPM, Vollrath argues that he had a legitimate expectation that Georgia-Pacific would not discharge him without just cause. Vollrath points specifically to oral and written statements made by the Plant Manager at various times such as "the best way to keep your job was to do it" as well as the memorandum from the Plant Manager to Vollrath.

After reviewing the evidence presented, the Court concludes that the comments made are not sufficient to create a legitimate expectation of continued employment. Comments regarding continued employment such as chances are "very good" do not affect the company's termination policy. *See Pratt* v. *Brown Machine Co.*, 855 F.2d 1225, 1234 (6th Cir. 1988). The evidence relied upon by Vollrath to support his claim establishes that he only had a subjective expectation of dismissal only for cause. However, "plaintiff's subjective expectation does not create an enforceable contract right." *Dell* v. *Montgomery Ward and Co.*, 811 F.2d 970, 974 (6th Cir. 1987); *Dzierwa* v. *Michigan Oil Co.*, 152 Mich. App 281, 285 (1986).

In addition, the memorandum written from the Plant Manager to Vollrath is not sufficient to create an implied contract of just cause employment in this case. First, the memorandum was written at the time the 1983 OPM was in effect and the at-will policy specifically indicated that it could not be modified except by the Chief Executive Officer of the company. Further, *Toussaint* makes it clear that there can be no legitimate expectation that a particular policy of continued

employment will remain in force where the employer is entitled to unilaterally change such policy. *See Toussaint*, 408 Mich. at 619; *Renny* v. *Port Huron Hospital*, 427 Mich. 415, 428-29 n. 7 (1986). Vollrath's deposition testimony recognizes that the company could unilaterally change its policies and he would be bound by them. Moreover, Vollrath admits that the memorandum made no difference to his decision to move into the maintenance supervisor position. Finally, at the time of Vollrath's discharge the 1985 OPM was in effect and expressly stated Georgia-Pacific's at-will policy. The Court finds that whatever expectations Vollrath might have had based on these representations were unreasonable both in light of the pre-existing 1983 OPM and the subsequently issued 1985 OPM. *See Pratt*, 855 F.2d at 1235.[5] The express language of the OPM negates any expectations Vollrath may have had based on the Plant Manager's assurances. *See Ledl* v. *Quik Pik Food Stores, Inc.*, 133 Mich. App. 583 (1984).

Toussaint preserves an employer's right to "enter into employment contracts terminable at will without assigning cause." *Toussaint*, 408 Mich. at 610. Thus, *Toussaint* claims are denied as a matter of law, "if the employer expressly indicates that there is no guarantee of further employment or that the employment is terminable

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[5] Likewise, the Sixth Circuit in *Dell* v. *Montgomery Ward and Co.*, 811 F.2d 970 (6th Cir. 1987), affirming the district court's grant of summary judgment that the plaintiff could not maintain a *Toussaint* claim for wrongful discharge, stated:

> It is difficult to imagine what more the defendant might have done to make it crystal clear to [the plaintiff], and all [defendant's] employees, that, unless some other arrangement were made directly with the President and Chief Executive Officer or Executive Vice President of Human Resources, [defendant's] employees are employees "at will" who may be discharged with or without cause.

Id. at 974.

at will." *Pratt*, 855 F.2d at 1235 (citations omitted). The Court concludes that the unequivocal language of the handbook reserved the right to discharge employees without cause. The explicit language used by Georgia-Pacific in the handbook "means what it says and is binding upon the parties." *Dell*, 811 F.2d at 974.

The Court recognizes that "a claim for wrongful discharge cannot be maintained where, as here, the employment is on an 'at will' basis." *Haas* v. *Montgomery Ward and Co.*, 812 F.2d 1015, 1016 (6th Cir. 1987) (citations omitted). Thus, this Court must conclude as a matter of law that in light of the express disclaimers negating an employment contract terminable only for just cause, the contract at issue here was an at-will contract which could be terminated with or without cause.[6] Accordingly, Georgia-Pacific's motion for summary judgment must be granted and the instant action dismissed with prejudice.

/s/ BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

DATED: December 5, 1988

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[6] Since the Court concludes that Georgia-Pacific had reserved the right to terminate its employees at will, it is not necessary for the Court to reach the issue of whether *Toussaint* applies in the workforce reduction situation or whether in this case the discharge was pursuant to a workforce reduction.